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TAD\WTG\2012S-1000

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN OF PENNSYLVANIA**

**IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
LITIGATION**

No. 12-md-2323 (AB)

MDL No. 2323

**THIS DOCUMENT RELATES TO:
ALL ACTIONS**

**PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY TO DEFENDANTS'
AND CLASS COUNSEL'S RESPONSE TO MOTION TO MODIFY
THE OCTOBER 14, 2014 OPT-OUT DATE**

Plaintiffs, TREGG DUERSON, Personal Representative of the Estate of DAVID R. DUERSON, Deceased, and RAY AUSTIN, by and through their attorneys, CORBOY & DEMETRIO, P.C., respectfully request that this Court grant leave to file the attached Reply to Defendants' and Class Counsel's Response to Motion to Modify the October 14, 2014 Opt-Out Date, and states:

1. On July 29, 2014, Plaintiffs filed an Emergency Motion to Modify or Amend the July 7, 2014 Order [6048] Requiring Opt-Outs on or before October 14, 2014 . (ECF 6172.)
2. On September 2, 2014, Defendants, National Football League, and Co-Lead Counsel filed their Response to Plaintiffs' Motion. (ECF 6184 and ECF 6186.)
3. Plaintiff now requests leave to file the attached Reply. (Exhibit "A.")

WHEREFORE, TREGG DUERSON, Personal Representative of the Estate of DAVID R. DUERSON, Deceased, and RAY AUSTIN, by and through their attorneys, CORBOY &

DEMETRIO, P.C., respectfully request that this Court grant leave to file the attached Reply to Defendants' and Class Counsel's Response to Motion to Modify the October 14, 2014 Opt-Out Date.

/s/ William T. Gibbs

William T. Gibbs

Corboy & Demetrio, P.C.
Attorneys for Plaintiffs
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EXHIBIT A

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**THIS DOCUMENT RELATES TO:
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**PLAINTIFFS' REPLY TO NFL AND CLASS COUNSEL'S RESPONSE TO MOTION
TO MODIFY THE OCTOBER 14, 2014 OPT-OUT DEADLINE**

Plaintiffs, TREGG DUERSON, Personal Representative of the ESTATE OF DAVID DUERSON, deceased, and RAY AUSTIN, by and through their attorneys, CORBOY & DEMETRIO, P.C., reply to Defendant, NATIONAL FOOTBALL LEAGUE, and Co-Lead Class Counsel's Response to their motion and state:

Class Counsel's Response Brief is critical of Plaintiffs' citation to Supreme Court Rule 23(e)(3), the Supreme Court's *Amchem* Opinion and MCL §§ 22.611 and 22.924 and state that "nor has our research uncovered precedent for inverting the customary sequence of events." (ECF No. 6184 at p. 9.) This statement is baffling in light of the fact that, in this District Court, in a case in which current Co-Lead Class Counsel, Sol Weiss, served as Class Counsel, Counsel for Subclass 1, Diane M. Nast, served as Subclass Counsel, and Counsel for Subclass 2, Arnold Levin, served as Liaison Counsel, they incorporated into their settlement agreement multiple opportunities to opt-out. *See In re Diet Drugs*, 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (permitting additional opt-outs if absent Class Members developed or discovered medical problems after the expiration of the original opt-out period, or if their conditions worsened);

See In re A.H. Robins Co., Inc., 880 F. 2d 709, 743-45 (4th Cir. 1989) (permitting additional opt-outs upon Claim adjudication), *abrogated on other grounds by Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 150, 166, 169-70 (S.D. Ohio 1992); *Nilsen v. York County*, 382 F. Supp. 2d 206, 221 n.9 (D. Me. 2005) (permitting additional opt-outs if the terms of the settlement change after Fairness Hearing); *In re Serzone*, 231 F.R.D. 221, 229-30 (S.D. W. Va. 2005) (permitting additional opt-outs if actual awards are lower than the amounts promised in the original settlement agreement, or if the fund proves inadequate to satisfy all of the claims presented).

As the Third Circuit has professed, where Absent Class Members contract a disease in the future and are faced with little or no monetary compensation, in part due to Class Counsel “freezing the science in place,” these individuals should be afforded a delayed opt-out opportunity. *Georgine v. Amchem Prods.*, 83 F. 3d 610, 630-631 (3d Cir. Pa. 1996) (citing *Bowling v. Pfizer, Inc.*, 143 F.R.D. at 150) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).

WHEREFORE, Plaintiffs request an Order amending and/or modifying paragraph 4(g) in its July 7, 2014 Order and extending the Opt-Out Date to an appropriate time following the Fairness Hearing of November 19, 2014.

/s/ William T. Gibbs

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Certificate of Service

On October 6, 2014, I electronically filed a copy of the foregoing document through the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania, which will send a notice of electronic filing to all counsel of record and make it available for viewing and downloading from the CM/ECF system.

/s/ William T. Gibbs

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[PROPOSED] ORDER

AND NOW, on this ____ day of _____, 2014, upon consideration of Plaintiffs' Motion for Leave to File Reply to NFL Class Counsel's Response to Motion to Modify the October 14, 2014 Opt-Out Date it is hereby **ORDERED** that:

Plaintiffs are granted Leave to File Reply to NFL Class Counsel's Response to Motion to Modify the October 14, 2014 Opt-Out Date.

SO ORDERED this ____ day of _____, 2014.

Anita B. Brody
United States District Court Judge